



9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG-2012-0717]

RIN 1625-AA00

Safety Zone; Liberty to Freedom Swims, Liberty Island, Upper Bay and Hudson River, NY

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

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SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of Upper New York Bay, NY and the Lower Hudson River for the September 5, 2012 and September 15, 2012 Liberty to Freedom swim events. This temporary safety zone is necessary to protect the maritime public and event participants from the hazards associated with swim events. This rule is intended to restrict all vessels and persons from entering into, transiting through, mooring, or anchoring within the safety zone unless authorized by the Captain of the Port (COTP) New York or a designated representative.

DATES: This rule is effective from 9:30 a.m. on September 5, 2012 until 5:00 p.m. on September 15, 2012. This rule will be enforced from 9:30 a.m. until 11:00 a.m. on September 5, 2012 and

from 3:00 p.m. until 5:00 p.m. on September 15, 2012.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG-2012-0717. To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type the docket number in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12-140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail LTJG Kristopher Kesting, Sector NY Waterways Management, U.S. Coast Guard; Telephone (718) 354-4154, E-Mail [Kristopher.R.Kesting@uscg.mil](mailto:Kristopher.R.Kesting@uscg.mil). If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366-9826. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366-9826.

#### SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS	Department of Homeland Security
FR	Federal Register
NPRM	Notice of Proposed Rulemaking
COTP	Captain of the Port

#### A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b) (B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because sufficient information about the event was not received in time to publish a NPRM followed by a final rule before the effective date, thus making the publication of a NPRM impractical. The Coast Guard received the information about the events on July 14, 2012. Any delay encountered in this regulation's effective date by publishing a NPRM would be contrary to public interest, because immediate action is needed to provide for the safety of life on the navigable waters from the hazards of swimming in the Upper New

York Bay and the Lower Hudson River, particularly in the vicinity of the shipping channel.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the Federal Register. The event sponsor is unable and unwilling to postpone this event because the dates of these events were chosen based on optimal tide, current, and weather conditions needed to promote the safety of swim participants. In addition, any change to the date of the event would cause economic hardship on the marine event sponsor. The rule must become effective on the dates specified in order to provide for the safety of the swimmers and vessels operating in the area near this event. Delaying this rule would be impracticable and contrary to the public interest, and would expose swimmers and vessels to the hazards associated with the swim events.

For the same reason discussed above, under 5 U.S.C. 553(d)(3) the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the Federal Register.

#### B. Basis and Purpose

The legal basis for this rule is 33 U.S.C 1231; 46 U.S.C Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 6.04-1, 6.04-6, 160.5; Pub. L. 107-295, 116 Stat. 2064; Department of

Homeland Security Delegation No. 0170.1.

This temporary safety zone is necessary to ensure the safety of swimmers and vessels from hazards associated with the swim events.

#### C. Discussion of the Final Rule

This rule establishes a temporary safety zone on the navigable waters of the Upper New York Bay and the Lower Hudson River, in the vicinity of Liberty Island, Jersey City, Manhattan, and Governors Island. All persons and vessels shall comply with the instructions of the Captain of the Port (COTP) New York or the designated representative during the enforcement of the temporary safety zone. Entering into, transiting through, or anchoring within the temporary safety zone is prohibited unless authorized by the COTP New York, or the designated representative.

Based on the inherent hazards associated with open water swimming, the COTP New York has determined that swimmers in close proximity to water crafts pose a significant risk to the swimmers and vessels. The combination of a high traffic area, congested waterways, and limited visibility of active swimmers have the potential to result in serious injuries or fatalities. This temporary safety zone will restrict vessels from a portion of the Upper New York Bay and Lower Hudson River around the location of the swimmers during the event.

The Coast Guard has determined that this regulated area will not have a significant impact on vessel traffic due to its temporary nature and the fact that vessels will be allowed to transit the navigable waters around the location of the swimmers in the regulated area.

Advanced public notifications will also be made to local mariners through appropriate means, which will include, but are not limited to, the Local Notice to Mariners as well as Broadcast Notice to Mariners.

#### D. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

##### 1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

The Coast Guard's implementation of this temporary safety zone will be of short duration and is designed to minimize the

impact to vessel traffic on the navigable waters. This temporary safety zone will only be enforced for approximately 2 hours. Due to the location, vessels will be able to transit around the zone in a safe manner.

## 2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

(1) This rule will affect the following entities, some of which may be small entities: the owners and operators of vessels intending to transit or anchor in a portion of the navigable waters in the vicinity of the marine events during the effective periods.

(2) This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons: this rule will be in effect for 2 hours; vessel traffic could pass safely around the safety zone, and the Coast Guard will notify mariners before activating the zone by appropriate means including but not limited to Local Notice to Mariners and Broadcast Notice to Mariners.

## 3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the FOR FURTHER INFORMATION CONTACT, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

#### 4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

#### 5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the



States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

#### 6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the "FOR FURTHER INFORMATION CONTACT" section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

#### 7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

#### 8. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630,

Governmental Actions and Interference with Constitutionally Protected Property Rights.

9. Civil Justice Reform This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

10. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

11. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

12. Energy Effects

This action is not a "significant energy action" under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

### 13. Technical Standards

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

### 14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a temporary safety zone. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2-1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under ADDRESSES. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

### List of Subjects in 33 CFR Part 165

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard

amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREA

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C 1231; 46 U.S.C Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 6.04-1, 6.04-6, 160.5; Pub. L. 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add §165.T01-0717 to read as follows:

§165.T01-0717 Safety Zone; Liberty to Freedom Swim, Liberty Island, Upper Bay and Hudson River, NY

(a) Regulated Area. All navigable waters of the Upper New York Bay and lower Hudson River, NY, bound by the following points:

position 40°41'16.4"N, 074°02'57.3"W, then northeast to position 40°41'57.0"N, 074°02'07.3"W, then north to position 40°42'25.9"N, 074°02'04.6"W, then northeast to position 40°42'51.2"N, 074°01'03.2"W, then south to position 40°42'16.5"N, 074°01'07.1"W, then southwest to position 40°41'03.6"N, 074°02'34.6"W, then back to the point of origin.

(b) Effective Date. This rule is effective from 9:30 a.m. on September 5, 2012 until 5:00 p.m. on September 15, 2012. This rule will be enforced from 9:30 a.m. until 11:00 a.m. on September 5, 2012 and from 3:00 p.m. until 5:00 p.m. on September 15, 2012.

(c) Definitions. The following definitions apply to this section:

(1) Designated Representative. A "designated representative" is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port Sector New York (COTP), to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF-FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) Official Patrol Vessels. Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(3) Spectators. All persons and vessels not registered with the event sponsor as participants or official patrol vessels.

(d) Regulations. (1) The general regulations contained in 33 CFR 165.23, as well as the following regulations, apply.

(2) No vessels, except for event coordinators and support vessels, will be allowed to transit the safety zone without the permission of the COTP. Vessels not associated with the event that are permitted to enter the regulated areas shall maintain a separation of at least 100 yards from the participants.

(3) All persons and vessels shall comply with the instructions of the COTP or the designated representative. Upon being hailed by a U.S. Coast Guard vessel by siren, radio,

flashing light, or other means, the operator of a vessel shall proceed as directed. Failure to comply with a lawful direction may result in expulsion from the regulated area, citation for failure to comply, or both.

(4) Vessel operators desiring to enter or operate within the regulated area shall contact the COTP or the designated representative via VHF channel 16 or 718-354-4353 (Sector New York command center) to obtain permission to do so.

(5) Spectators or other vessels shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas during the effective dates and times, unless authorized by COTP or the designated representative.

(6) The COTP or the designated representative may delay or terminate any marine event in this subpart at any time it is deemed necessary to ensure the safety of life or property.

Dated: August 20, 2012

G. A. Loebel,  
Captain, U.S. Coast Guard  
Captain of the Port New York

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